

Hon. Kyle Bryson, Petitioner
Presiding Judge
Superior Court of Arizona in Pima County
110 W. Congress St., Tucson, AZ 85701

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO PERMANENTLY)	No. R-20-0012
ADOPT RULES FOR THE FAST TRIAL)	
AND ALTERNATIVE RESOLUTION)	REPLY
PROGRAM (“FASTAR”))	
_____)	

This Court by Administrative Order No. 2017-116 adopted rules for a pilot program in the Superior Court in Pima County commonly referred to as “FASTAR,” (“FASTAR” is an acronym for the Fast Trial and Alternative Resolution Program.) This rule petition requested the Court to permanently adopt these FASTAR rules, with certain modifications. This Reply will discuss several comments filed on the Court Rules Forum. The Reply concludes by supporting a recommendation of the State Bar to extend the FASTAR pilot program and to adopt a variety of proposed amendments to the FASTAR rules for the duration of the pilot.

(1) Background. As noted in this rule petition, the FASTAR program had its genesis in a recommendation made by the Court’s Committee on Civil Justice

Reform (“CJRC”). The CJRC recommended the implementation of a pilot program in Pima County allowing plaintiffs whose complaints requested a limited amount of money damages (essentially, Tier 1 cases) to opt for a short trial in lieu of proceeding to compulsory arbitration under current Civil Rules 72 through 77. The compulsory arbitration program under Civil Rules 72 through 77 was originally intended to provide a speedy and economical alternative to a jury trial. However, after years of experience with the compulsory arbitration program, the CJRC determined that these goals were not uniformly achieved. As Petitioner noted in his rule petition:

The CJRC found that the time from filing a complaint to the entry of judgment on an arbitration award could require as much time as if the matter had initially gone to trial. The CJRC also found that court-appointed arbitrators occasionally have no experience in the subject matter they are arbitrating, or that setting arbitration hearings and deciding cases are lesser priorities for arbitrators than attending to their clients’ cases. Some litigants reportedly felt they did not have their day in court when their case was heard in an attorney’s office rather than a courtroom. Compulsory arbitration provides a right to appeal an arbitration award, but “appeal” is a misnomer; it is really a trial de novo that often involves new witnesses and evidence—increasing rather than mitigating litigation costs—rather than strictly an appeal on the record of the arbitration. Moreover, defendants who prevail at the new trial can obtain potentially draconian sanctions, including attorney’s fees and expert witness fees, against a plaintiff who nonetheless prevailed at the arbitration. (See Civil Rule 68(g) regarding sanctions on an offer of judgment, and Civil Rule 77(h) concerning sanctions on an appeal from a compulsory arbitration award.)

(2) The FASTAR Program. The proposed FASTAR rules were previously adopted by Administrative Order No. 2017-116 in conjunction with the Court’s

authorization of a three-year FASTAR pilot program in the Superior Court of Arizona in Pima County. The three-year pilot began in November 2017, and these rules provided a procedure for cases in the pilot. The rules apply in superior court cases in which a plaintiff requests only monetary damages, and the amount sought by any party does not exceed \$50,000. These rules allow plaintiffs to choose either Alternative Resolution, which is like compulsory arbitration, or a Fast Trial before a judge or a jury. The Fast Trial option allows plaintiffs to have their day in court, eliminates the need for an expensive trial de novo following an arbitration award, provides trial experience for attorneys, and underscores the historic and cultural role of juries in the American justice system.

(3) The FASTAR Rules. The FASTAR rules were vetted by members of the Pima County Bar during judicial outreach before the start of the pilot program. To easily differentiate these rules from the Rules of Civil Procedure, each FASTAR rule is identified by a three-digit number. The FASTAR rules are in three parts. Part One applies to all FASTAR cases. Parts Two and Three respectively apply to cases in the Fast Trial and Alternative Resolution Tracks.

(4) *Duff v. City of Tucson.* *Claudia Duff v. City of Tucson* is a tort case filed in the Superior Court of Pima County in May 2018, i.e., during the term of the FASTAR pilot program, which alleged negligent operation of a vehicle by a City of Tucson employee. Plaintiff Duff contended by motion that she had a right to

compulsory arbitration of her case under Civil Rules 72, et seq., and that the FASTAR program unlawfully deprived her of that right and a companion right to appeal the arbitrator's award. The superior court denied Duff's motion, and she sought special action relief in the Court of Appeals. On March 29, 2019, Division Two filed an opinion (case number 2 CA-SA 2018-0058) accepting jurisdiction and essentially denying relief. The opinion concluded:

FASTAR and local rules governing [A.R.S.] § 12-133 arbitration limits are procedural matters subject to the supreme court's constitutional authority. We conclude the change in those limits and the implementation of FASTAR in Pima County were an appropriate exercise of that authority, effective November 1, 2017, as set forth in Administrative Order No. 2017-116. [Plaintiff's] case is subject to those provisions. Accordingly, we accept jurisdiction and deny relief, with the exception of affording [Plaintiff] the opportunity to file a FASTAR 'Choice Certificate,' electing a FASTAR short trial or binding alternative dispute resolution, within twenty days of this order.

Plaintiff Duff thereafter filed a petition for review, which this Court granted. The Court heard oral argument on February 18, 2020 to consider, among other issues, whether the FASTAR program violated the separation of powers provision in Article 3 of the Arizona Constitution. The matter as of this writing is still pending disposition. If the Court grants Duff the requested relief, then this rule petition becomes moot and the Court should disregard the remainder of this Reply. If the Court denies relief, Petitioner asks this Court to consider the following Reply to the Rules Forum comments.

(5) Reply to the Comments Generally. Of the seven comments filed on the Court Rules Forum, two are easily addressed. A comment by Victoria Katz on behalf of Aderant noted an incorrect cross-reference in draft Rule 122. That is easily correctable, as shown in the Appendix to this Reply. The Honorable David Mackey, Chair of the Committee on Superior Court, filed a short comment expressing the Committee's support of the petition. His comment also noted that some Committee members who were absent when the Committee discussed this rule petition had voiced their concerns, and Judge Mackey encouraged these members to file separate comments expressing their personal views. However, no comments were filed thereafter by individual Committee members.

More detailed comments were filed by four Pima County practitioners (Mr. Marks, Mr. Fleischman, Mr. Marchetti, and Mr. Buechel), all of whom opposed this rule petition. Petitioner notes that no comment, supportive or opposing, was filed by the Pima County Bar Association, and Petitioner is unable to conclude that the four practitioners speak for the entirety of the local bar. A comment filed by the State Bar of Arizona asked the Court to defer permanent adoption of the proposed rules, and to instead extend the program as a pilot pending further study and evaluation of its effectiveness.

Petitioner notes as a preliminary matter that FASTAR Rule 101(a), as modified by this petition, would provide that the FASTAR rules “apply in counties

where the superior court has established a program for a fast trial with an alternative resolution option.” This petition did not ask the Court to establish a FASTAR program statewide. Rule 101(a) would defer that issue—whether the bench in any county should establish a program—to superior court judges in each county for their future determination.

(6) Reply to the Comments from the Pima County Practitioners. Major points in the four practitioners’ comments can be summarized as follows:

- (a) The FASTAR program is coercive (two of these four comments use the word “forced”), because selection of the alternative resolution option requires a plaintiff to waive the right to appeal.
- (b) Selection of the fast trial option unnecessarily requires the summoning of citizens to serve on a jury.
- (c) Appeals from compulsory arbitration do not disadvantage personal injury plaintiffs.
- (d) FASTAR rule provisions regarding service of process and the introduction of medical bills and records are faulty.

Petitioner now responds to these points.

(a) Waiver of rights. Petitioner agrees that the waiver of a jury trial is the waiver of a substantive right. However, the Arizona Constitution permits such waivers. Article 6, Section 17 of the Arizona Constitution provides in part, “The

right of jury trial as provided by this constitution shall remain inviolate, but trial by jury may be waived by the parties in any civil cause....” Under the FASTAR rules, the parties are indeed afforded the opportunity of a trial by jury. But as permitted by the Arizona Constitution, the FASTAR rules offer a choice of waiving that right.

Waivers of legal rights have consequences. The consequence of waiving the constitutional right to a jury trial, as specified in the FASTAR rules, is that the waiving plaintiff will proceed to adjudicate the claim by an alternative resolution process, which is like compulsory arbitration, and that the plaintiff will forego the right to appeal the alternative resolution award and then have a jury decide the claim, which the plaintiff could have had initially but declined. These waivers are clearly expressed in the rules and are valid. See FASTAR Form 3(b), the Choice Certificate, which includes this language:

By checking this box and choosing Alternative Resolution, I hereby knowingly and voluntarily waive Plaintiff(s)’ constitutional and statutory rights to a trial (jury or bench), including the right to appeal the Alternative Resolution result.

The corollary is that FASTAR allows plaintiff to not waive these rights, to instead receive a trial as guaranteed by the constitution and, if desired, to take an appeal from the resulting judgment. Thus, the FASTAR rules preserve the rights to jury and to appeal.¹

¹ Mr. Buechel’s references to the right to appeal under A.R.S. §§ 12-2101 and 12-2101.01 require some clarification. An appeal in the traditional sense is a review of

Moreover, even when a plaintiff chooses the Fast Trial option, the plaintiff is under no compulsion to try the case to a jury. FASTAR Rules 103(b) and 117(a) allow the alternative of a bench trial. A trial by a judge affords all the advantages—possibly even more—of a hearing before an arbitrator. Judges may be more experienced than many court-appointed arbitrators. (Civil Rule 73 requires that an arbitrator have 4 years of active bar membership; does any superior court judge have only 4 years of practice experience when they are enrobed?) Unlike an appointed arbitrator, who might have infrequent court appointments and have no training in conducting an adversary proceeding, a judge’s full-time duty includes hearing and resolving opposing claims. And unlike arbitration hearings that take place in a conference room, bench trials occur in a courtroom, which conveys to the litigants the authority of that setting.

The gist of the practitioners’ comments is that compulsory arbitration works well. That being the case, practitioners can continue to request alternative resolution in their FASTAR choice certificates. But if the practitioners’ objective is to have an alternative resolution hearing and, if dissatisfied with the result, a second trial—

another court’s earlier record of proceedings and determinations. Arbitration appeals are different. As then Judge Pelander observed in *Valler v. Lee*, 190 Ariz. 391 (Division 2, 1997): “The authority [the real party in interest] cites, although applicable to civil appeals to the court of appeals and the supreme court, *see* [ARCAP Rule 1](#), is inapposite in the context of compulsory arbitration, in which an ‘appeal’ is not a request for review but, rather, a demand for trial *de novo*. ”

possibly this time to a jury—then we would have a system that has the inefficiencies already inherent in compulsory arbitration.

(b) Inconvenience of jury service. Summoning jurors to hear a trial might, and probably does, inconvenience them. But many jurors, whose knowledge of trials is perhaps gained from movies or second-hand accounts, also appreciate the opportunity to serve on a jury and acquire first-hand knowledge of what is otherwise a vague responsibility of citizenship. A jury trial is participatory democracy, and juries have been an essential component of the common law for centuries. Judges on the civil bench report that because fast trials are limited to two days, very few prospective jurors ask to be excused from sitting on the jury. Yes, civil attorneys might gain jury trial experience as prosecutors or public defenders, but while there are similarities in criminal and civil trials, there are also important differences. The contention that new attorneys can obtain jury trial experience only by practicing criminal law slights the significance of juries in the civil area.

In recent decades, civil trials have become so expensive to parties that fewer cases, mostly higher value claims, proceed to trial. The dwindling number of civil jury trials has led to a phenomenon known as the “vanishing jury trial,” as noted in footnote 1 of this rule petition, which Petitioner believes is unfortunate, because the right to a jury trial under the Arizona Constitution has no dollar demarcation. If this downward trend continues, in the future we might have arbitration attorneys or

mediation counsel but no genuine trial lawyers. Petitioner's December 12, 2019 report to the Arizona Judicial Council noted that in the second year of the FASTAR pilot program, 15 cases went to trial, which is a reversal of the long-standing decline.² FASTAR allows jury resolution of cases with lower values, and because by rule FASTAR trials are shorter and procedurally straightforward, they should be less costly, too.³ And frankly, attorneys who have done jury trials are probably more capable and more-rounded lawyers because of that experience. Jury trial experience may also provide practitioners with better insight in evaluating their cases, which can lead to quicker settlements, thereby lessening the costs of litigation.

(c) Arbitration appeals are not disadvantageous. Mr. Fleischman's comment observed that personal injury plaintiffs could not have been disadvantaged under the compulsory arbitration system because there were only 5 trials de novo.

² Petitioner recently reviewed data concerning the percentage of civil case dispositions in the superior court of Pima County during the past 24 years that followed either a bench or a jury trial. In 1985, 3.97% of civil dispositions occurred after trial. That number rose to 4.57% in 1987. Thereafter, the percentage progressively declined to a low of 0.67% in 2017. In 2019, the number was 0.77%.

³ Please also note the article by Kelly Wilkins and Troy Daniel Roberts, "[Arizona Civil Verdicts: 2018](#)" in the June 2019 issue of the *Arizona Attorney*. The article reported that statewide, while the average plaintiff's verdict in 2018 was \$902,603, the statewide median plaintiff's verdict was \$60,624. Pima County's respective figures in this article were \$116,634 and \$57,000. If the median verdict in Pima County was \$57,000, some verdicts would necessarily have been less than that amount, quite possibly in the "under \$50,000" range that would have otherwise made those cases subject to compulsory arbitration or FASTAR.

However, this observation overlooks anecdotal reports of plaintiffs who could not afford to proceed to a trial de novo and instead settled for a reduced amount to avoid the possibility of draconian sanctions permitted under the current Civil Rules.

(d)Issues with the FASTAR rules. The practitioner's comments question the reduction of the time allowed for service of the summons and complaint, which is 90 days under Civil Rule 4(i) and 60 days under FASTAR Rule 104(a). First, current FASTAR Rule 104(c) permits the plaintiff to request a 30-day extension to complete service. Second, this concern has been previously raised, and Petitioner addressed it at pages 8-9 of his petition. Sixty days should allow for service in most cases. In those cases where it is insufficient, the plaintiff can apply for an extension or other relief. The provision on service underscores the goal of timely disposition of these claims.

Petitioner acknowledges the practitioners' comments concerning the disparity in the admission of medical bills at trials versus alternative resolution hearings. The process for the admission of medical bills at an alternative resolution hearing under FASTAR Rule 123(d) was modeled on Civil Rule 75(d). Under both rules, and in the absence of a pre-hearing objection, the arbitrator must admit the bills. There is no required showing of reasonableness and necessity. On the other hand, under FASTAR Rule 117(d), a party who requests the admission of a medical bill at a bench or jury trial must establish that the amount of the bill is reasonable and that

the service described in the bill was medically necessary. This conforms to the practice for the admission of a medical bill in any other superior court civil trial. FASTAR Rule 117(d)(5) permits the admission of medical records and medical reports at trial, and FASTAR Rule 117(e) permits the introduction of the video recorded deposition of a medical provider. In combination, the admission of medical records and facilitated deposition testimony should allow a party to lay the requisite foundation of reasonableness and necessity without undue burden. But Petitioner acknowledges the genuine concern raised by the Pima practitioners; see further section (9) of this Reply, which discusses R-20-0014.

(7) Reply to the comment from the State Bar. The State Bar’s comment is “supportive of the FASTAR program and its goals,” and noted that the results thus far “are promising” and that the program “is achieving some of its objectives.” However, the comment believed that permanent adoption of the FASTAR rules “is premature,” and requested instead that the pilot program be extended for three additional years, with modifications to the rules, to enable the accumulation of more data and other measurements of the program’s value.

Petitioner agrees that we are now about 2.5 years into the pilot program, and that we do not yet have data for the full, three-year pilot. The State Bar’s comment that *Duff v. City of Tucson* “leaves the FASTAR program under a cloud of uncertainty” echoes Petitioner’s observation earlier in this Reply. Petitioner also

observes that the COVID-19 pandemic might have consequences on the FASTAR program, such as the feasibility of empaneling juries, that are not yet fully appreciated. Also, the COVID-19 pandemic has made the data on FASTAR after March 2020 unsuitable for comparison purposes because the superior court cannot set cases for trial within the timeframe prescribed by the FASTAR Rules. According, Petitioner does not oppose, but rather supports, the State Bar's recommendation of continuing the pilot program in Pima County for three more years, that is, until October 31, 2023, with the adoption of modified rules shown in the Appendix to this Reply.

Petitioner also supports the State Bar's proposed modification to FASTAR Rule 102(d) in lieu of the version Petitioner initially suggested. The State Bar's version of Rule 102(d) will achieve the desired result, which is to allow for the exclusion of cases from the FASTAR program of otherwise eligible cases when there is a showing of "extraordinary case characteristics." (Petitioner modified the term "Arizona Rules of Civil Procedure" used in the State Bar's version to simply say "civil rules," which is a shorter and defined term.)

(8) Decrease Burden on Practitioners to Serve as Arbitrators. Statistics kept by the superior court show a marked decrease in the number of arbitrators appointed after the FASTAR program began in November 2017:

Calendar Year	# Cases Assigned an Arbitrator
2015	741
2016	705
2017	770
*2018	373
**2019	398

* **2018** Pre-FASTAR compulsory arbitration in **110** cases
FASTAR alternative resolution was selected in **263** cases

****2019** Pre-FASTAR compulsory arbitration = **59** cases
FASTAR alternative resolution selected in **339** cases

Having to appoint fewer arbitrators lessens the burden on the court to appoint them, and on practitioners to serve.

(9) R-20-0014. Attorney James Abraham filed a separate rule petition in the current cycle, R-20-0014. His petition proposes to eliminate the alternative resolution process, which undersigned Petitioner opposes because alternative resolution is an integral part of the FASTAR process.

Mr. Abraham's petition also proposes an amendment to Rule 117(d) whereby the amounts of all medical bills would be presumed reasonable. The presumption would be rebuttable. Petitioner understands that the State Bar's Civil Practice and Procedure Committee has been studying this issue. If the Court defers action on this

petition, it would allow that Committee and other stakeholders to give this issue further consideration and propose solutions that have broad support.

(10) Conclusion. Petitioner therefore requests the Court to defer action on this petition, and to instead extend the FASTAR pilot program in Pima County for three additional years. Petitioner further requests the Court to adopt for the pilot program the correction to Rule 122 noted by Aderant's comment, the modification to Rule 102(d) proposed by the State Bar, and the other modifications proposed in the January rule petition. These changes are shown in the Appendix to this Reply.

RESPECTFULLY SUBMITTED this 1st day of June 2020.

/S/

Hon. Kyle Bryson
Presiding Judge
Superior Court of Arizona in Pima County